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No. 1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

GEORGE SCHUMANN; ET UX, ET AL.,

Respondents.

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION UNDER THE LAWS OF FLORIDA,

Petitioner,

vs.

EDWIN H. BRAIN, ET UX, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

Claude L. Mullis, Sr.
William Lee Allen
1103 City Hall
Jacksonville, Florida 32202
Counsel for Petitioner

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, First District

of Florida, entered in the above entitled cases, consolidated for trial and appeal purposes, on June 15, 1967.[1]

CITATIONS TO OPINIONS BELOW

The opinion of the District Court of Appeal on interlocutory appeal, printed in Appendix B hereto, infra, p. 19 is reported in 167 So. 2d 95. The memorandum opinion of the Circuit Court (R-79) is unreported and is printed in Appendix B hereto, infra, p. 37. The opinion of the District Court of Appeal on final judgment printed in Appendix B hereto, infra, p. 49, is reported in 199 So. 2d 727.

JURISDICTION

The judgment of the District Court of Appeal, First District of Florida, was entered on June 15, 1967 (R-784). A timely petition for rehearing (R-789), and suggestion that the decision be certified as passing upon a question of great public interest (R-792), filed on June 23, 1967, were denied on July 10, 1967 (R-796-7). A timely petition for a writ of certiorari to the Supreme Court of Florida filed July 21,

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[1]RESPONDENTS - SCHUMANN. George Schumann, Emilie Schumann; Lee J. Porter, Margie C. Porter; William Henry Lewis, Evelyn Howard Lewis; Allen K. Johnson, Laura Johnson; Howard F. Bell, Marguerite S. Bell; L. G. Zorn, Sr., Rilla Zorn; Ethel Louise Martin Henthorn; Maribelle Pendley McWhorter; Cleo E. Goff, Lucille Goff; William T. Key, Nelda E. Key; Conrad Markle, Jr., Earleen Markle; Anthony L. Becker, Helen A. Becker; Neil S. Wilson, Lonie B. Wilson; Bertha J. Wilson; David Vernon Edwards, Gladys Verna Edwards; Paul M. Mulligan, Leila Mulligan; John L. Ganey, Blanche M. Ganey; Arnold R. Hagen; Robert Charles Hosker, Julia Belle Hosker; Charles H. Hosker; Hugh Doyle Colding, Hazel L. Colding; Roger E. Ferrell, Frances Lucille Ferrell; Giles V. Cline, Helen L. Cline; Major Ray Suggs, Mary Itus Suggs, Ida L. Broward; Elizabeth Mae Powers, Aaron William Powers; Hoyt E. Broward, Margaret Ann Broward; Louie Lee Broward, Mary Agnita Broward; Trenton A. Blanton, Elizabeth D. Blanton. BRAIN. Edwin H. Brain, Lucille M. Brain; Anna Lee Welch, Everett L. Welch.

1967 (R-798) was denied on October 5, 1967 (R-847). A timely petition for rehearing filed on October 17, 1967 (R-848) was denied on November 1, 1967 (R-850). The jurisdiction of this court is invoked under 28 U.S.C. §1257(3) since a right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of the United States.

QUESTIONS PRESENTED

I

Whether a state can hold a municipal operation of an airport liable for the taking of an easement in property by virtue of noise, vibrations, smoke and the like emanating from flights of commercial and military jet aircraft originating from its airport, when the flights are in the navigable airspace of the United States at altitudes above the 500 foot minimum safe altitude of flight prescribed by regulations issued under 49 U.S.C. §1301 et seq., when such flights do not take place over the property of the complaining owner, and when such flights are lawfully conducted in the manner required by all applicable federal rules and regulations.

II

Whether it constitutes an unconstitutional burden on interstate commerce for a state constitutional provision, against the taking of property without just compensation, to be construed so as to impose liability as a result of lawfully conducted flights in the navigable airspace of the United States at altitudes above the 500 foot minimum safe altitude of flight prescribed by regulations issued under 49 U.S.C. §1301 et seq?

III

Whether a state can hold a municipal owner of an airport liable for the taking of an easement in property by virtue of noise, vibrations, smoke and the like emanating from the ground operation of military jet aircraft under the air defense command of the United States, on premises leased to the United States for its exclusive use and control, when the federal courts have consistently held under such circumstances that there is no fifth amendment taking by the United States; even when the United States is owner and operator.

STATUTES INVOLVED

The statutory provisions involved are Sections 101(24), 104 and 307(a) of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. §§1301(24), 1304 and 1348(a). The regulation involved is F.A.R. 91.79, 14 C.F.R. 60.17. They are printed in Appendix A, infra, pp. 17, 18.

STATEMENT

The municipal airport of the City of Jacksonville has been in existence since prior to World War II (R. 5-6). There are three runways: the East-West runway (9-27), the Southeast-Northwest runway (12-30) and the Northeast-Southwest runway (5-23) (R-780). In 1962, a 1000 foot extension was made to the northeast end of the Northeast-Southwest runway (5-23) by the United States Army Corps of Engineers, at the request of the Air Defense Command of the United States, because of the use of the field by the Florida Air National Guard, a component of such Command (R-172). The use of the field is pursuant to a lease between the United States and petitioner, whereby the Air Guard has exclusive possession of a portion of the field, and the right

to operate therefrom, with an agreement to indemnify and hold petitioner harmless for all claims for demands or damages arising out of the use or occupancy of the field by the Guard (R-14) (Appendix B, infra, p. 40). The extension of the runway was completed on December 11, 1962 (R-172).

A look at the attached drawing[2], respondents' exhibit 4, an aerial photograph, (R-780), and petitioner's exhibit 14, a map[3], will give a clear indication of the relative locations of the airport, respondents' properties and the area acquired by petitioner outside the airport boundary, at the northeast end of the Northeast-Southwest runway. (This area divides the Cedar Bay residential area into two parts (R-6).

In 1963, respondent property owners living along Cedar Bay Road, the road running easterly and westerly along the northern boundary of the municipal airport, (R-5 & 103) (R-780) brought an inverse condemnation action against petitioner, seeking to require petitioner to exercise its power of eminent domain as to their respective properties, alleging a taking thereof by petitioner in violation of the Constitution and laws of the State of Florida and the United States (R-10 & 108). The taking was alleged to have occurred because of the use of extended runway 5-23 by commercial jets, and those of the Florida Air National Guard (R-8 & 105).

In its answer, petitioner raised the following defense:

> The United States Congress, by the Federal Aviation Act of 1958, 49 U.S.C.A. 1301, et seq., re-enacted a public right of freedom of transit through the navi-

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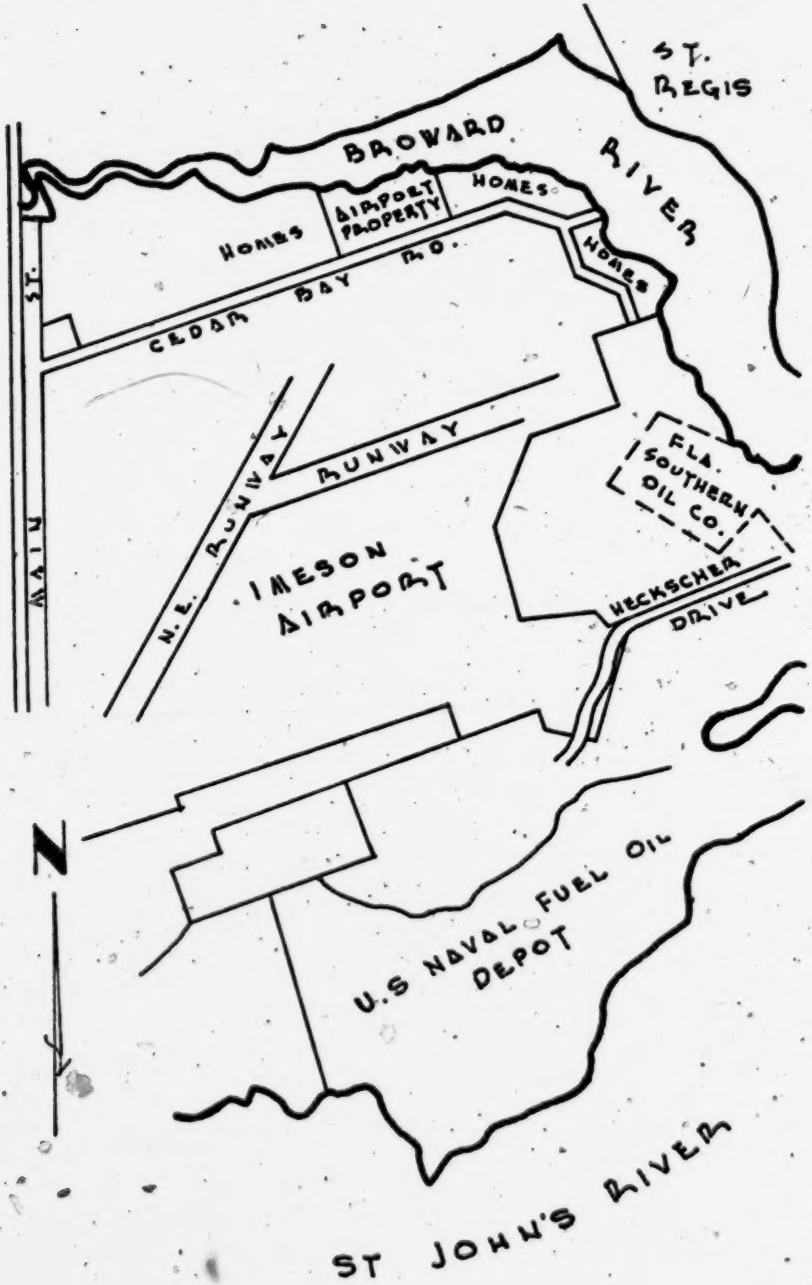
[2]Adapted from sketch appearing in Burritt v. Harris, Fla. App. 1964, 166 So. 2d 168 at page 177, a property rezoning case involving lands adjoining the airport and Cedar Bay Road.

[3]Forwarded to the Clerk of this Court, pursuant to Rule 38, by mail on January 16, 1968.


ST. REGIS
BROWARD
RIVER
HOMES
AIRPORT PROPERTY
HOMES
HOMES
CEDAR BAY RD.
MAIN ST.
N.E. RUNWAY
RUNWAY
IMESON AIRPORT
FLA. SOUTHERN OIL CO.
HECKSCHER DRIVE
N
U.S NAVAL FUEL OIL DEPOT
ST JOHN'S RIVER

gable airspace thereby exempting lawful flights of aircraft in the navigable airspace from noise damage claims by landowners, under any circumstances short of such severe interference as would constitute a taking of the landowners' properties without due process of law. (Schumann Sixth Defense (R-14) (Brain Fifth Defense (R-112).

On motion of respondents, the defense was stricken (Schumann R-32) (Brain R-127). After trial of the issues, the lower court found a taking of a temporary easement[4] in the properties of all the respective properties of respondents on the basis of takeoffs, landings and ground operation of the jet, commercial and Air National Guard aircraft (R-90 & 140).

The evidence was that, with respect to respondents' properties, on takeoff the planes were above the 500 foot minimum altitude of flight[5], established by regulation promulgated by the Administrator of the Federal Aviation Agency pursuant to 49 U.S.C. §1348(a)[6], and did not normal-

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4". . . a temporary easement which it has taken in fact in the properties of those plaintiffs which are within one-half mile of each side of the Northeast-Southwest runway, including a distance of 3,000 feet from its Northeast end, for the purpose of permitting any plane to make noises, emit gases, fumes and smoke, to cause vibration and concussion, and to disturb or blast dust and small particles of matter against and onto plaintiffs' properties, for the period beginning December 11, 1962, and ending December 11, 1968 . . ." (R-90) (Appendix B, infra, p. 47).

5Captain Royall testified that his aircraft would be at an altitude of 400-600 feet when crossing the airport boundary (R 650). Captain Simon stated his altitude at the end of the runway would be 300-500 feet, sometimes higher (R 740), and that his altitude crossing the river would be approximately 1000 feet (R 741). Captain Jamieson, who had actually checked his altitudes, gave them as 400 feet at the Northeast end of runway 5, 800 feet at Cedar Bay Road, 1200 feet at the south bank of the river and 1600 feet at the north bank (R 763).

6"Except when necessary for takeoff or landing, no person shall operate an aircraft below the following altitudes:

* * *

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle or structure. . ." 14 C.F.R. 60.17 (F.A.R. 91.79).

ly fly over respondents properties. On landing on runway 23, heading southwest, the planes were apparently below 500 feet, but did not fly over the respondents' properties. All flights were within normal take off and approach areas to the airport, and the glide path to runway 5-23 does not extend over the property of any of the respondents.[7]

On appeal, the striking of the defense that the flights occurred in the navigable airspace of the United States was assigned as error:

> The lower court erred in striking defendant's sixth defense (Schumann R-96).
>
> The lower court erred in striking defendant's fifth defense (Brain R-159).

The assignment of error in each case was argued as point one in the brief in each case, thusly:

> Whether or not the court erred in finding that plaintiffs are entitled to be compensated for the taking of their property as the result of the flight of jet aircraft in the navigable airspace of the United States.

The decision of the lower court was affirmed, *City of Jacksonville v. Schumann*, Fla. App. 1967, 199 So. 727 (Appendix B, infra, p. 49). Petition for certiorari to the Supreme Court of Florida, within the narrow confines of Florida Appellate Rule 4.5c(6) was denied (Appendix A, infra, p. 18).

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[7]Captain Mayes, United Airlines (R 593-616); Carl Leavitt, F.A.A. (R 617-623); Colonel Moore, Air Guard (R 625-641); Captain Royall, National Airlines (R 642-682); Captain Simon, Delta Airlines (R 737-752); Captain Jamerson, Eastern Airlines (R 753-768).

HOW FEDERAL QUESTION IS PRESENTED

Summarizing the statement of the case, supra, in this regard, the defense of a public right of transit in the navigable airspace of the United States pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq. was raised in petitioner's answer, stricken by the trial court, this action assigned as error on appeal and argued in the briefs. The District Court of Appeal affirmed the trial court, and the Supreme Court of Florida denied certiorari.

REASONS FOR GRANTING THE WRIT

1. CONFLICT — The decision of the court below is in direct conflict with the decisions of the Tenth Circuit Court of Appeals in *Batten* v. *United States*, 306 F. 2d 580 (1962), cert. den. 371 U.S. 955; and the United States Court of Claims in *Avery* v. *United States*, 330 F. 2d 640 (1964). As stated by the court in Batten:

> "This case presents the novel question whether a taking of property, compensable under the Fifth Amendment, occurs when there is no physical invasion of the affected property but the operation and maintenance of military jet aircraft on an air force base of the United States produce noise, vibration and smoke which interfere with the use and enjoyment of the property." 306 F. 2d at 581.

The Avery case involved property owners adjoining the Naval Air Station in Sanford, Florida, and presented the same question involved in Batten. The statement of the court as to certain of the properties is pertinent:

> "Aside from rare emergency situations, there were no flights directly overhead at less than 500-foot altitude over these parcels. Consequently, under the

> law as it is now enacted and construed, there is no compensable taking of easement on these parcels, — the inconvenience and injury to the property being "incidental" and "unavoidably attendant" to the use of the airways. Alva A. Aaron, et al. v. United States, Ct. Cl. No. 489-58, decided January 11, 1963; Matson v. United States, 145 Ct. Cl. 225, 171 F. Supp. 283 (1959); Richards v. Washington Terminal Co., 233 U.S. 546, 555 (1914); Campbell v. United States, 266 U.S. 368 (1924)." 330 F. 2d at 643.

In this area there should not, and cannot, be a conflict in opinions of the state and federal courts. If States were free to construe the "taking" provisions of their constitutions in such a manner as to impose liability, jet air travel, with its obvious effect and impact on interstate commerce, would be either destroyed, severely curtailed, or burdened with exorbitant landing fees to reimburse the airport operator for the expense of acquiring easements for "incidental" injury.

2. IMPORTANCE — This case is of extreme national importance, affecting not only petitioner, but the municipal or authority operators of any jet airport, and their multitudinous citizens and taxpayers. At stake is the power of Congress to define and regulate the navigable airspace of the United States. If Congress has the power to define navigable airspace as:

> "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft. 49 U.S.C. §1301 (24)

and regulate it by providing that:

> There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States. 49 U.S.C. §1304,

its power would include the right of those using the public airspace[8] to be free from any claims for a taking of property.

This court has not decided any case involving the taking of non-overflight property by the flight of aircraft in the navigable airspace of the United States. *Causby* v. *United States*, 328 U.S. 256, involved flights over the land "so low and so frequent as to consitute a direct and immediate interference with the use and occupancy of the land", but at that time Congress had not defined navigable airspace as that including the "airspace needed to insure safety in takeoff and landing of aircraft".

The same situation existed at the time of the over flights in *Griggs v. Allegheny County*, 369 U.S. 84. Although the decision of this Court was not rendered until March 5, 1962, it appears from the opinion of the Pennsylvania Supreme Court (*Griggs v. Allegheny County*, 402 Pa. 411, 168 A. 2d 123) that the flights in that case took place before the enactment of the Federal Aviation Act of 1958. This act was adopted August 23, 1958, and the provision that the navigable airspace includes airspace needed for takeoff and landing did not take effect until December 31, 1958, sixty days after the first Administrator was appointed. (See Section

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[8]Either above the minimum safe altitude of flight established by regulation (500 feet in this case) or in take off and landing. Certainly, where there are no over-flights of the respondents' lands and the easement ordered taken is neither a clearance (obstruction) easement nor an avigation (flight) easement, which are susceptible of definition, but rather what might be termed an "enviromental easement", which defies definition.

1505(2) of the Act). In his opinion, the Pennsylvania Chief Justice stated (168 A. 2d at 124) that Griggs filed his petition on May 29, 1958, a date seven months before the Federal Aviation Act took effect. The flights upon which the cause of action in the Griggs case was predicted of necessity took place prior to that date, and at a time when the below quoted provisions of the Air Commerce Act and the Civil Aeronautics Act were in effect. It also appears from the State Court opinion (168 A. 2d at 124), that the Griggs petition alleged a taking on June 1, 1952, the date on which the airport was opened for public use, which was some six years before the enactment of the Federal Aviation Act. While the provision in the Federal Aviation Act was mentioned by this Court in the Griggs case, there is nothing to suggest a belief that it would have a retroactive effect. It would seem that at the time of the flights in the Griggs case, the navigable airspace was as defined in the Civil Aeronautics Act and the Civil Aviation Act, i. e., the airspace above the minimum safe altitudes prescribed by regulation. The Pennsylvania Court also mentioned a regulation prescribing such altitudes "except where necessary for takeoff or landing", but apparently did not feel that this phrase had the effect of prescribing minimum altitudes for takeoff or landing.

The Griggs case, therefore, like the Causby case, is one dealing with over flights outside the navigable airspace. As yet there has been no decision by this Court with respect to liability for noise and interference caused by aircraft flying within the navigable airspace of the United States while taking off or landing, and certainly not where the flights are above the minimum altitude of flight, and are not overflights.

3. ERROR IN COURT BELOW: — Cognizant of the statement in United States v. Causby, supra, that,

> "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." (328 U.S. at 266),

and that, as to their respective properties, any overflights above the 500 foot minimum safe altitude of flight established by regulation, would be in the navigable airspace of the United States, each plaintiff alleged *overflights* below 500 feet (the most common altitude being between 100 - 150 feet), so frequent as to "destroy the value of their properties as residences or other use requiring the presence of human beings or animals" (R 7-8; R-106) (Appendix B, infra, pp. 20-22).

The Trial court found that overflights were not the gravamen of respondents' complaint (Appendix B, infra, pp. 42 & 45), and made no finding as to frequency, except to find that the noise occurs ". . . at frequent intervals and at all times of the day or night . . ." (Appendix B, infra, p. 40). The finding as to the alleged "destruction of the value of the properties or residences", was limited to a determination that, based on the testimony of a real estate appraiser, the fair market value of respondents' properties had been lessened. (Appendix B, infra, p. 41). The testimony of this appraiser is illuminating[9]. None of the numerous respondents had moved from their property as a result of the airport.

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[9]It is felt that the two questions and answers set forth verbatim below adequately set forth Mr. Barker's testimony.

Q. Mr. Barker, based on your experience in the real estate field and your familiarity with the market, would you tell us what, in your opinion, has been the effect on the market value of the Brain and Welch properties, and the other properties lying within the distance

Petitioner's exhibit 14, a map, forwarded earlier to the Clerk of this Court (see footnote 3, supra)[10] reveals clearly that only five properties of respondents are located south of Cedar Bay Road. Of these, three sets of owners granted petitioner avigation easements while the extended runway was in the process of construction.[11] Thus it is readily apparent that, on takeoff the planes were well above the minimum altitude of flight established by regulation. Captain Jamieson of Eastern Airlines testified that his altitude on takeoff with a DC-8 was 400 feet at the northeast end of runway 5, 800 feet at Cedar Bay Road, 1200 feet at the south bank of the river and 1600 feet at the north bank of the river (R 762-763). This testimony was corroborated by Captain Royall of National Airlines (R-650) and Captain Simon of Delta Air Lines (R 740-741).

Ground operation of jet aircraft has not been held to constitute a "taking" of property within the meaning of any State Constitution or of the Constitution of the United States prior to this case. Herein the court found that residences abutting the warmup pad or parking apron of the Air Guard "especially suffered from dust or other debris", and that the sharp concussion or explosion when the Air

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of the not more than one-half mile from either side of a prolongation of the center line of this runway since the date of the commencement of use of the runway as extended? (R-268)

A. The construction of the extension of the runway has for a distance of some one-half mile on either side of the center line of the runway caused in my opinion a decrease in the value of the properties within that area. (R-269)

Q. And it is your judgment and opinion that they have been diminished in market value as a direct and proximately result of the extension of that Northeast-Southwest Runway? (R-269)

A. It is my opinion. (R-269)

[10]See also Plaintiffs' exhibit number 4, a vertical aerial photograph of the airport and environs. (R-780)

[11]Becker, October 30, 1962 (R-52); Key, September 26, 1962 (R-55); Goff, August 1, 1962 (R-58).

Guard fighter jets afterburner was used was a particular bone of contention (Appendix B, infra, p. 40).

The decision of the trial court, affirmed by the District Court of Appeal, requires petitioner to condemn an "environmental"[12] easement(R 90 & 140) (Appendix B, infra, p. 47, despite the fact that the only two recognized types of aviation easements are clearance (obstruction) easements, and avigation (flight) easements. *United States v. Brondum*, Fifth Circuit, 272 F. 2d 642.

Unlike Causby, supra, there was no path of glide passing over the properties of any of the respondents, no overflights and no destruction of the use of the property. This is not the case of an elevated railway passing over respondents' lands.

Again, unlike Griggs, supra, there is no path of glide passing over any of respondents properties, no overflights, and no removal from the premises. This is not the case of a bridge without approaches.[13]

Additionally, in the instant case, there is a failure of proof of frequency as existed in Causby, supra, (328 U.S. at 259) and Griggs, supra, (369 U.S. at 87) A good example of the *lack* of "frequency" is the testimony of plaintiff Broward as to being awakened at night by planes taking off. He actually gave dates and times (R-209), but can once a night on October 7, 10, 11, 12, 13, 15, 18 and twice on October 16 and 19 be considered "frequently"?

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[12]See footnote 4 above.

[13]On takeoffs, when the noise and vibrations were greater, the planes would have gotten onto the "bridge" prior to flying near respondents' properties.

The state court thus erred in striking the defenses that the flights complained of took place in the navigable airspace of the United States, as the evidence shows clearly that the takeoff and landings are the main complaint of respondents (R. 81-82), and without consideration of flights in the navigable airspace of the United States, either above the minimum altitude of flight established by regulation, or while taking off and landing, the evidence would not, and could not, support a finding of a taking.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Claude L. Mullis, Sr.

William Lee Allen
1103 City Hall
Jacksonville, Florida 32202

Counsel for Petitioner

APPENDIX